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No. 90-1337

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

OLIVER L. NORTH, RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

In opposing our petition, North suggests that the decision below is both wholly routine and of "uniquely narrow application" because most immunized testimony is given in the secrecy of the grand jury. Br. in Opp. 9. It is difficult to believe that these suggestions are put forward seriously. The court of appeals, which devoted 90 pages over four majority and dissenting opinions to the immunity issues in this case, certainly thought that it was settling what then-Chief Judge Wald described as matters of "exceptional importance." Pet. App. 255a. And the issues raised here will arise in virtually every case involving a congressional grant of immunity—cases, as we explain in our petition (at 21-22), that invariably are of the most fundamental public importance. Such cases are far from rare; a review of documents memorializing congressional grants of immunity reveals that Congress has conferred use immunity on more than 300 witnesses over the last two decades. As the plethora of decisions cited in our petition and the brief in opposition make clear, the issues presented here also arise with some frequency in routine prosecutions. The practical significance of these issues, and the division of judicial opinion that they have generated, simply cannot be gainsaid.

1. a. As we explained in our petition (Pet. 11-14), the Second Circuit (in *Ricciecio*) and the Fourth Circuit (in *SIGMA*) have read this Court's decisions to preclude dismissal of an indictment on the ground that a grand jury was exposed to evidence tainted by the defendant's immunized statements. North acknowledges (albeit elliptically) that the decision below cannot be squared with those rulings. See Br. in Opp. 14-15. North also does not deny that the issue is an important and recurring one. In opposing the petition, he offers only the improbable assertion that *Ricciecio* and *SIGMA* somehow do not state the law in their respective circuits. But that manifestly is not so.

North contends that the Second Circuit "has consistently ruled in accord with the D.C. Circuit decision here" (Br. in Opp. 14) and that *Ricciccio* "does not acknowledge this long line of authority" (Br. in Opp. 15). Neither prong of this assertion is correct. The Second Circuit consistently has *recognized* that this Court's decisions in *Calandra*, *Blue*, and *Lawn* preclude dismissal of an indictment in circumstances such as those present here.[1] As for the "long line" of assertedly contrary authority, the *Ricciccio* court itself specifically cited and distinguished two of the cases advanced by North (see Br. in Opp. 15 n.17), explaining that they fall within one of "two narrow exceptions" to its general rule—neither of which would apply in the instant case. 919 F.2d at 816 n.4. *United States* v. *Tantalo*, 680 F.2d 903 (2d Cir. 1982) and *United States* v. *Hinton*, *supra*, the *Ricciccio* court observed, are within an exception recognized by

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[1] See *United States* v. *Halper*, 590 F.2d 422, 433 n.16 (2d Cir. 1978) (citing *Calandra* and *Lawn* for proposition that indictment need not be dismissed when defendant was given no opportunity to assert privilege prior to grand jury's consideration of records); *United States* v. *Coyne*, 587 F.2d 111, 115 (2d Cir. 1978) (citing *Calandra* and *Blue* in support of district court's refusal to dismiss the indictment in response to claim that grand jury considered immunized testimony); *United States* v. *Ruffin*, 575 F.2d 346, 351 n.8 (2d Cir. 1978), quoting *United States* v. *Washington*, 431 U.S. 181, 185 n.3 (1977) (rejecting challenge to an indictment for failure to give so-called "target warnings" when the defendant testified before the grand jury because "the Supreme Court has recently noted that 'an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence'"). The Second Circuit's earlier decisions expressly left open the question whether *Blue* and *Lawn* precluded dismissal of the indictment in such circumstances. See *Goldberg* v. *United States*, 472 F.2d 513, 516 n.4 (2d Cir. 1973) (citing *Blue* and *Lawn*, "we do not take it to be settled that an indictment would not be subject to dismissal"); *United States* v. *Dornau*, 491 F.2d 473, 481 n.15 (2d Cir. 1974) ("[i]t may be" that dismissal precluded), cert. denied, 419 U.S. 872 (1974). Cf. *United States* v. *Hinton*, 543 F.2d 1002, 1008 n.7 (2d Cir.), cert. denied, 429 U.S. 980 (1976) (not "settled" that *Blue* and *Lawn* preclude dismissal of indictment when same grand jury hears immunized testimony and then indicts the defendant).

the Second Circuit in cases where "the defendant testifies under immunity before the same grand jury returning the indictment or when the immunized testimony is placed before the indicting grand jury." 919 F.2d at 816 n.4. Two of the other cases cited by North are in this category as well.[2] *United States* v. *Kurzer*, 534 F.2d 511, 514, 517 (2d Cir. 1976), also cited by North (Br. in Opp. 15 n.17), falls within the second exception recognized by *Ricciccio*, which applies when "the indictment rests almost exclusively on tainted evidence." 919 F.2d at 816 n.4.[3]

In fact, *all* of the Second Circuit decisions relied upon by North were cited to the *Ricciccio* court (See No. 89-1581, U.S. Br. at 29; Appellant's Br. at 11, 20, 27, 28, 29), which did not find them to support the defendant's position; the full Second Circuit denied without dissent a suggestion for rehearing en banc. The decision accordingly must be taken as an authoritative statement of the law in the circuit. Moreover, despite North's suggestion to the contrary (Br. in Opp. 15), *Ricciccio* expressly eschewed any harmless error ground for its decision (see 919 F.2d at 817 n.5), holding instead that "the appropriate remedy for the use of immunized testimony before a grand jury is the suppression of the tainted evidence

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[2] *United States* v. *Pelletier*, 898 F.2d 297, 300 (2d Cir. 1990) (immunized testimony in terms presented to grand jury); *United States* v. *Anzalone*, 555 F.2d 317, 319 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978) (same grand jury hears immunized testimony and indicts).

[3] One case cited by North, *United States* v. *Nemes*, 555 F.2d 51 (2d Cir. 1977), does not fall into either exception recognized by *Ricciccio*. But *Nemes*—which made no mention of the *Calandra* line of cases and predated the Second Circuit's repeated application of *Blue* and *Lawn* (see note 1, *supra*)—simply ordered a remand so that the district court might assess the asserted use of tainted evidence before the grand jury and at trial. If use before the grand jury were found, the court of appeals advised the district court simply to "consider" the appropriateness of dismissing the indictment. *Id.* at 55. Indeed, the court of appeals expressly "decline[d] to rule at this stage whether the grand jury use of any tainted evidence invariably requires dismissal." *Id.* at 55 n.6. That holding hardly conflicts with *Ricciccio*.

at trial." *Id.* at 816-817. The conflict between the holding below and that of the Second Circuit is thus irreconcilable.

North's challenge to the vitality of *SIGMA* (see Br. in Opp. 14) rests entirely on the observation that the case was decided prior to the rulings of the other circuits upon which the decision below relied, and that the Fourth Circuit has not since expressly reaffirmed *SIGMA*'s holding. But the important point here, of course, is that the Fourth Circuit has not *questioned* the validity of *SIGMA*, and that decision accordingly continues to govern the disposition of prosecutions in the Circuit. Because the decision of the court of appeals in this case cannot be reconciled with *SIGMA*—as the court below candidly acknowledged (Pet. App. 41a)—review by this Court is warranted.[4]

b. North's attempt to distinguish this Court's decisions in *Blue* and *Lawn* also is without merit. North simply repeats the analysis of the court below (see Br. in Opp. 10-11); as we explain in our petition, however, that analysis cannot be reconciled with the Court's most recent (and most directly applicable) description of the Fifth Amendment privilege—a description that North simply

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[4] North asserts (Br. in Opp. 13-14 & n.15) that five courts of appeals (rather than two, as we state in our petition at 11-12) have ruled in accord with the court below on the grand jury question. We disagree with this characterization. *United States* v. *Garrett*, 797 F.2d 656 (8th Cir. 1986), and *United States* v. *Zielezinski*, 740 F.2d 727 (9th Cir. 1984), which are cited by North, involved defendants who were indicted by the very grand juries to which they had provided immunized testimony, and rested on invocation of the courts' supervisory authority rather than (as did the decision below) on the Constitution. See *Garrett*, 797 F.2d at 658, 660-662, 664; *Zielezinski*, 740 F.2d at 728-730, 731 n.2, 732. *United States* v. *Palumbo*, 897 F.2d 245 (7th Cir. 1990), also cited by North, made no mention of the *Calandra* line of cases; in any event, the evidence presented there under an informal grant of immunity provided the only evidence on a crucial point. *Id.* at 251 n.6. Having said this, however, for present purposes we cheerfully acquiesce in the suggestion that the split in the circuits involves eight rather than five courts of appeals.

ignores. See Pet. 15-16, discussing *United States* v. *Verdugo-Urquidez*, 110 S.Ct. 1056, 1060 (1990). North also mischaracterizes the import of this Court's decision in *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794 (1989), which is significant here for its recognition that *Lawn* involved the "*grand jury's* violation of the defendant's right against self-incrimination." 489 U.S. at 801 (emphasis added). While North finds *Midland Asphalt* inapposite (Br. in Opp. 11-12 n.14), the court below recognized the decision's applicability and attempted to apply it by holding that exposure to immunized testimony might have "caused 'the grand jury no longer to be a grand jury.'" Pet. App. 41a, quoting *Midland Asphalt*, 489 U.S. at 801. North wisely makes no attempt to defend that analysis, which is, as we explain in our petition (Pet. 16), an obvious misapplication of *Midland Asphalt*.[5]

2. North does not deny that the courts of appeals are in disarray on the proper application of *United States* v. *Mechanik*, 475 U.S. 66 (1986), does not deny that questions about the scope of *Mechanik* are recurring ones of enormous practical importance, does not deny that inquiries into the nature of grand jury proceedings would be time-consuming and disruptive—and does not squarely deny that *Mechanik* would preclude dismissal of the indictment on the grounds asserted here if the trial were untainted. See Br. in Opp. 18 & nn. 22, 23. Instead, he contends only that a decision on the applicability of *Mechanik* "would be purely advisory" (*id.* at 16) because the courts below have not yet determined that the trial in this case was error-free.

While we agree, of course, that the trial has not yet been certified as untainted under the court of appeals' novel Fifth Amendment standard, a decision on the scope

[5] It should be added that our point in this is not—as North repeatedly hints (see Br. in Opp. 10, 13)—that a grand jury's consideration of evidence tainted by immunized testimony is proper. Instead, the question here is whether dismissal of a facially valid indictment is an appropriate remedy when a grand jury has been exposed to such evidence.

of *Mechanik* most assuredly would not be advisory. If a remand remains necessary after this Court's consideration of the case, a proper application of *Mechanik* would have the district court begin its inquiry by examining the evidence at trial—and end the inquiry at that point if the trial is found to have been untainted. In contrast, the court of appeals directed the district judge to examine the testimony of the trial *and* grand jury witnesses (Pet. App. 44a), and to dismiss a tainted indictment regardless of his findings as to the trial (*id.* at 45a). At a minimum, then, consideration of *Mechanik's* applicability will structure and order any remand; it might well obviate the need for an extraordinarily burdensome and time-consuming hearing that would play havoc with secrecy of the grand jury proceedings. It also, of course, would resolve an important and unsettled question that requires authoritative determination. Because the *Mechanik* point was expressly presented to (see U.S. Br. No. 89-3118 (D.C. Cir.), at 15 n.26) and necessarily resolved by the court below, review by this Court is appropriate.[6]

3. In opposing a grant of certiorari to review the court of appeals' substantive Fifth Amendment holding, North asserts (Br. in Opp. 23-24) that a remand is necessary because the decision below failed to identify all of the asserted errors committed by the district court. But that misstates the ruling below. In fact, the court of appeals specifically grounded its decision on two, and only two, foundations: it concluded that evidence provided by witnesses whose memories had been refreshed by exposure

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[6] North is incorrect in asserting (Br. in Opp. 17) that our brief to the court of appeals in *United States* v. *Poindexter*, No. 90-3125 (D.C. Cir.), "recognized that there was no need for the court of appeals even to have addressed *Mechanik*" in this case. We did note that the *North* panel may have failed to discuss *Mechanik* because it found that the trial may have been tainted. Br. 57. We also explained, however, that the *Mechanik* issue "[t]o some extent * * * appear[s] to be foreclosed for this panel [in *Poindexter*] by the decision in *North*," and we informed the *Poindexter* panel that we would be raising the *Mechanik* issue (among others) "in a petition for a writ of certiorari in [*North*]." *Ibid.*

to immunized testimony must be excluded, and it found that the district court's procedures failed to guarantee that the contents of the witnesses' testimony had not been altered by North's immunized disclosures. See Pet. App. 12a, 44a-45a. The court thus logically presented its analysis under the headings "*Refreshment*" (*id.* at 20a; see *id.* at 20a-25a) and "'*Identity of Witness*' *vs.* '*Content of Testimony*'" (*id.* at 26a; see *id.* at 26a-36a). These holdings are entirely legal in nature.[7]

With this in mind, North's arguments about the state of the record are beside the point; the court of appeals' holding on refreshment is an enormously important one that warrants review. Having said that, however, it should be added that North misstates the record when he suggests (Br. in Opp. 22-23) that the witnesses whose memories were revived might not have had an independent recollection of events. Both the district court and the court of appeals described the memories here as "refreshed," a term uniformly used to describe an existing recollection that—as the district court described it below (Pet. App. 293a)—has been "stirred" or "stimulated." Indeed, it is black letter law that a refreshed witness may testify at trial only if his recollection *actually* has been "revived * * * so that his testimony relates to a present recollection." 3 J. Weinstein & M.

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[7] North quotes the court of appeals' statement that refreshment of recollection "was merely 'indicative, but not exhaustive, of the *Kastigar* questions left unanswered on the present record.'" Br. in Opp. 23, quoting Pet. App. 26a. But the "unanswered" questions, the court immediately went on to observe, were those involving what it termed the "'content-of-testimony' *Kastigar* problem" (Pet. App. 26a), which flowed from what it viewed as the inadequacy of the district court's procedures to guarantee that the content of the witnesses' testimony had not been influenced by North's immunized disclosures. There accordingly are only two issues presented by the decision below: those involving refreshment, and those involving the district court's procedures. Needless to say, the observation in our petition (at 23) that the witnesses did not "learn new information from North," which is challenged by North (Br. in Opp. 23 n.27), was directed only at the court of appeals' refreshment analysis.

Berger, *Weinstein's Evidence* ¶ 612[01] at 612-62 (1990) (footnote omitted). The district court, which was aware of the refreshment issue from the pretrial proceedings, accordingly must have been of the view that the witnesses at trial had a present recollection of events. That conclusion was not disturbed by the court of appeals.

Despite North's argument to the contrary (Br. in Opp. 24-25 & n.29), the court of appeals' holding on refreshment is a striking departure from the practice in other circuits. Persons who have been exposed to immunized testimony routinely have been permitted to offer evidence without an inquiry into refreshment.[8] And other courts have rejected arguments similar to those offered by North here—that the testimony of such a witness must be excluded "because there was a *possibility* that [the witness's] awareness of the contents of [the defendant's] testimony may have tainted" the witness's testimony—holding that "[t]he government is not required to negate all abstract 'possibility' of taint." *United States* v. *Byrd*, 765 F.2d 1524, 1529 (11th Cir. 1985) (emphasis in original). See *United States* v. *Lipkis*, 770 F.2d 1447, 1450-1451 (9th Cir. 1985). The court of appeals' contrary conclusion, which will necessitate a detailed psychological inquiry in every case involving public immunized testimony and which will have a dramatic impact on the "costs" of congressional immunity grants, clearly warrants this Court's consideration.

4. North insists (Br. in Opp. 18-19, 20-22) that the court of appeals' procedural ruling simply follows the dictates of *Kastigar*. The problem with this observation, of course, is that *Kastigar*, while obligating the government to establish the legitimacy of its evidence, says

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[8] North seeks to distinguish most of the cases cited in the petition by noting that the exposed witnesses had not been involved in the transactions at issue. Br. in Opp. 24-25 n.29. But this is a distinction without a difference, for the witnesses in those cases had, in one way or another, obtained information about the transactions prior to their exposure to the immunized testimony; the courts nevertheless did not express concern that the witnesses' memories might have been jostled by that exposure.

nothing about the procedures to be used in carrying that burden. And the court of appeals' rejection of the district court's burden-shifting approach is more than a factual quibble, as North asserts (Br. in Opp. 27). Instead, as then-Chief Judge Wald demonstrated below (Pet. App. 246a-247a), the district court's procedures are by far the most practical and manageable way of applying *Kastigar* in a case involving public immunized testimony. The court of appeals' alternative, in contrast—which flatly ordered the holding of an adversary evidentiary hearing in *all* cases involving the use of immunized testimony so that *all* the evidence would be examined on a witness-by-witness basis (see Pet. App. 224a, 225a, 227a)[9]—will require unnecessary and burdensome evidentiary hearings in all such cases (and in a great many cases involving nonpublic testimony as well). Further factual development will not assist the Court in resolving this issue; our point, after all, is that the procedures used in this case are legally sufficient.[10]

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[9] North fails to explain (see Br. in Opp. 26-28 & n.34) how the court of appeals' rule can be squared with the conclusion of other courts that "an evidentiary hearing is not mandated for all *Kastigar* motions." *United States* v. *Dynalectric*, 859 F.2d 1559, 1580 (11th Cir. 1988), cert. denied, 490 U.S. 1006 (1989). See, *e.g.*, *United States* v. *Biaggi*, 909 F.2d 662, 690 (2d Cir. 1990), cert. denied, 111 S. Ct. 1102 (1991); *Lipkis*, 770 F.2d at 1451; *Byrd*, 765 F.2d at 1532-1534; *United States* v. *Sockwell*, 699 F.2d 213, 217-218 (5th Cir.), cert. denied, 461 U.S. 936 (1983); *United States* v. *Provenzano*, 620 F.2d 985, 1006 (3d Cir.), cert. denied, 449 U.S. 899 (1980).

[10] The court of appeals' asserted "finding" (Br. in Opp. 27) that the government failed to make out a prima facie case establishing the legitimacy of its evidence is beside the point here; our contention is that the court below used the incorrect legal standard in reaching that conclusion. Similarly, North's assertion that there is reason to believe that the testimony of particular witnesses was tainted (see Br. in Opp. 27-28, citing Pet. App. 26a-28a, 226a) is grounded in large part on the simple observation that witnesses were exposed to or reviewed North's immunized testimony—an observation that will be true of virtually all witnesses in all cases involving public immunized testimony.

5. Finally, the interlocutory posture of the case does not militate against review. If left in place, the holding below will have an immediate and substantial impact on congressional practices. The issues we present in challenging that holding are wholly legal and are ripe for this Court's consideration. If they warrant review, those issues should be considered now, thus pretermitting a remand that would require a massive—and unnecessary—inquiry into the evidence offered by each of the government's 32 trial witnesses and each of the 89 witnesses who appeared before the grand jury after North's congressional appearance. Indeed, if the government were found not to have made the requisite showing in such a remand, the case would return to this Court (after very considerable wasted effort) in substantially its present form. Such delay would be unnecessary in any case, and is especially undesirable in one involving allegations of misconduct at the highest levels of the Executive Branch. And if the government were to prevail in the remand proceedings, review by this Court of the issues presented in our petition likely would be precluded altogether, leaving in place a holding that severely chills the congressional oversight function. See Pet. 21-22. Immediate review by this Court accordingly is imperative.

For the foregoing reasons and those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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